

OHIO'S BORROWING STATUTE OF LIMITATIONS— A QUAKING QUAGMIRE IN A DISMAL SWAMP

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"The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed in it."¹

I.

Whenever a court has before it a fact situation which has contacts with some state other than the forum, it many times proceeds through the "dismal swamp" of Conflict of Laws with a naivete of which it has long since rid itself in crossing other legal bogs encountered daily. All too often the court searches for a touchstone—a single word or a catchphrase that will unlock all the mysteries of the choice of law "quagmire"—although in other areas of the law such an approach is heartily discredited, not only by those who teach the subject-matter, but also by the courts themselves. Perhaps it is this very approach which has given the subject of Conflict of Laws an aura of magic and mystery, which causes the practitioner to avoid a "conflicts" problem as he would a dread disease—even if the result is that he loses a case which otherwise could be won.²

If only the courts would realize that a case which is usually classified by the digests as one in Conflict of Laws is not substantially different from any other case which they face, it is believed that much of this naivete would soon disappear. Every fact situation involves the preliminary problem of determining whose system of law is to be referred to in deciding the rights and duties of the parties. Usually this choice is simple: forum law is applied. It is applied because the operative facts have their "base" or situs in the forum, and for the forum suddenly to apply the laws of some other state or country would impose upon the parties a result which they could not anticipate. It would leave the outcome of every lawsuit to the whim of the particular court that was deciding the case.

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¹ William L. Prosser in *Interstate Publications*, Cook Lectures, University of Michigan, quoted by Goodrich, *Directive or Dialectic?* 6 VAND. L. REV. 442.

² Undoubtedly, the comparative newness of the field of conflict of laws contributes greatly to the difficulties. Goodrich dates the beginning of conflicts in this country at around 1870. GOODRICH, *CONFLICT OF LAWS* §2 (3d ed. 1949). Having had such a late start it is only natural that its growth would not compare to the older fields of law. However, since its importance is increasing daily, with the increasing disregard of state lines in business, transportation and communication, serious attention must be given to the problem of solving the policies underlying this comparative newcomer in the legal field.

On the other hand, whenever the facts have arisen in whole or in part in a foreign state, the court has before it a case which all recognize as one in Conflict of Laws.³ There is, however, no reason why this name should change the underlying policy in the selection of applicable law. The problem continues to be one of locating that jurisdiction in which the facts have their "base" and then referring to the law of that place to determine the results of the litigation. This referent principle expresses the factor which "connects" this fact situation with the legal system of some country.⁴ Commonly, we call it the "choice of law rule" and express it in such magic phrases as *place of contracting*, *place of performance*, *situs of the property*, *place where the tort occurred*, and so on. To the extent that these become mere touchstones and do not reflect the "base" of the most dominant contact (or contacts) in the particular situation they become open to suspicion.⁵ It is not, however, the purpose of this article to

³ "That branch of the law which deals with questions of the operative effect at the forum of foreign law because of a foreign fact element in the case is sometimes called Private International Law but in this country more usually Conflict of Laws." STUMBERG, *CONFLICT OF LAWS* 1 (2d ed. 1951).

"That part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognized, be given effect or be applied is called the Conflict of Laws." RESTATEMENT, *CONFLICT OF LAWS* §1(2).

See also; 1 BEALE, *CONFLICT OF LAWS* §§1.1, 1.2 (1935); GOODRICH, *CONFLICT OF LAWS* §1 (3d ed. 1949).

⁴ *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E. 2d 655, *app. dismissed*, 313 U.S. 549 (1941). The basis for referring to the law of another jurisdiction is not within the scope of this article. That is left for a complete discussion of choice of law rules. For example, in contract cases the courts have adopted several tests (the temptation is strong to call them "attempted touchstones"): (1) the place of making rule, *The Detroit & Cleveland Navigation Co. v. Hade*, 106 Ohio St. 464, 140 N.E. 180 (1922); *Alropa Corp. v. Kirchwehm*, *supra*; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. St. Rep. 241 (1878); (2) the place of performance rule, 23 HARV. L. REV. 1, 79, 194, 260 (1909) (articles by Professor Beale); *Pittsburgh, C., C. & St. Louis Rd. Co. v. Sheppard*, 56 Ohio St. 68, 46 N.E. 61 (1897); *Freeman's Bank v. Ruckman*, 57 Va. 126, 16 Gratt. 126 (1860); *Pritchard v. Norton*, 106 U.S. 124 (1882); (3) the intention of the parties rule, *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62 (1857); *Harrison v. Baldwin*, 5 Ohio C.C. 310, 3 Ohio Cir. Dec. 154 (1891), *aff'd* 53 Ohio St. 648, 44 N.E. 1138 (1895); *Greenlee v. Hardin*, 157 Miss. 229, 127 So. 777, (1930), where the court applied the intended law test to hold the contract invalid. A citation of further Ohio cases dealing with choice of law principles in the area of contracts can be found in 9 O. JUR. 2d, *CONFLICT OF LAWS*, §§61-76. A similar list of cases could be compiled for other areas of Conflict of Laws.

Here, then, is another of Professor Prosser's quagmires, caused—it is submitted—by the attempt of courts to force answers into rigid molds rather than to search for the fundamental reasons for choice of law rules. Compare the discussions in the cases cited above. See also *Scudder v. Union National Bank of Chicago*, 91 U.S. 406 (1875) and *Hall v. Cordell*, 142 U.S. 116 (1891) where on surprisingly similar facts the courts reached opposite results. For an excellent example of a case which recognizes the difficulties outlined here, see *Jones v. Metropolitan Insurance Company*, 158 Misc. 466, 286 N.Y.S. 4 (1936).

⁵ Recent cases have recognized that choice of law rules have significance

examine in any detail the policies underlying the various choice of law rules; they are mentioned merely to put the following discussion in its proper setting.⁶

Assuming that the court has decided that it will refer to the laws of some other jurisdiction to decide the outcome of this particular litigation, the added problem of *how much* of that law is applicable must then be answered.⁷ The traditional answer is to distinguish between matters "substantive" and matters "procedural."⁸ These are but shorthand phrases expressing this thought: if the matter is one of substance, the law referred to by the choice of law rule is applied; if it is one of procedure, then forum law is applied.⁹ And it is here that one of the quaking quagmires of this dismal swamp is encountered, for the distinction between substance and procedure is usually reached on an *a priori* basis with no thought to the *conflicts* reason for making the distinction.¹⁰ Authorities

only when they refer to the jurisdiction having the most intimate concern with the particular litigation. *Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E. 2d 417 (1945); *Jansson v. Swedish American Line*, 185 Fed. 2d 212 (1st Cir. 1950); *Boissevain v. Weil*, 1 K.B. 482 (1949); *Auten v. Auten*, 124 N.E. 2d 99 (New York 1954).

⁶ Cheatham and Reese, *Choice of the Applicable Law*, 52 COL. L. REV. 959 (1952).

⁷ Under one theory of conflicts, in every case the forum court applies only its own law in delimiting the rights and duties of the parties. The real problem in Conflict of Laws is the extent to which it will model that law after that of the forum to which it is referred by its choice of law rule. Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L. J. 736 (1924); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L. J. 468 (1928); Cavers, *The Two Local Law Theories*, 63 HARV. L. REV. 822 (1950); *Guiness v. Miller*, 291 Fed. 769 (S.D. New York 1923), *aff'd* 269 U.S. 71 (1925).

Other theories of conflict of laws are discussed in STUMBERG, *CONFLICT OF LAWS* 8-17 (2d ed. 1951) and GOODRICH, *CONFLICT OF LAWS* §6 (3d ed. 1949); *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (1918) (expressing the "vested rights" theory); *Hilton v. Guyot*, 159 U.S. 113 (1895) (expressing the "comity" theory).

⁸ Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L. J. 333 (1933).

⁹ That some law must be treated as procedural is not open to question. The problem is, instead, one of definition. How much law should be treated as procedural? ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940) 245-248. The result of treating some law as substantive and some as procedural is that in any conflicts action two systems of jurisprudence are being referred to determine the rights and obligations of the parties. *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N.E. 69 (1891); *Freas v. Sullivan*, 130 Ohio St. 486, 200 N.E. 639 (1936); *Collins v. McClure*, 143 Ohio St. 569, 56 N.E. 2d 171 (1944). No matter what theory of conflict of laws is followed, see note 7, *supra*, it would seem that the court should not apply local law when to do so would change the rights of the parties.

¹⁰ See, for example, *Levy v. Steiger*, 233 Mass. 600, 124 N.E. 477 (1919), where the court held that the burden of proving contributory negligence was a matter of procedure and thus the Massachusetts rule was to be applied to a

are borrowed from other areas of the law with a reckless abandon simply because (in an altogether different context and for an altogether different reason) the court or legislature has used the name "substance" or "procedure" in connection with the legal category under discussion.¹¹

Such an approach is well illustrated in the treatment given statutes limiting the time in which an aggrieved party may commence his cause of action.¹² These are considered by the great majority of decided cases as being procedural; that is, no matter where the operative facts of the particular case have their situs, the forum statute of limitations is applied

cause of action which arose in Rhode Island since the suit was brought in Massachusetts. The court relied upon *Duggan v. Bay State Street Railway Co.*, 230 Mass. 370, 119 N.E. 757 (1918) which was not a conflict of laws decision. The problem there was whether the Massachusetts statute putting the burden of proving contributory negligence on the defendant was constitutional. The court held that it was, stating that it "simply affects procedure and the burden of proof." Such a holding has nothing to do with whether the statute affects the outcome of litigation in a conflict of laws case.

Compare the approach in the *Levy* case, *supra*, with *Sampson v. Channell*, 110 Fed. 2d 754 (1st Cir. 1940), *cert. denied* 310 U.S. 650 (1940). Here the federal court held the same Massachusetts statute to be "substantive" within the meaning of *Erie Rd. v. Tompkins*, 304 U.S. 64 (1938), remarking: "It is apparent, then, that burden of proof does not fall within either category of 'substance' or 'procedure' by virtue of any intrinsic compulsion, but the matter has been made to turn upon the purpose at hand to be served by the classification." The "purpose" which the court found there was that of uniformity of decision between federal and state courts within the same state. This purpose is questionable in the framework of the relationship between federal and state courts, Hart, *The Relations Between State and Federal Law*, 54 COL. L. REV. 489 (1954). However in area of state-state relations, uniformity of results despite the locus of suit should always be the goal for which the forum court is striving in solving choice of law problems. It is admitted that the goal cannot be reached in every case—indeed, in some cases more weighty purposes must be given preference—but it should be jealously sought after unless it interferes unduly with the administration of justice at the forum. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L. J. 333 (1933).

¹¹ An example is found in *Marie v. Garrison*, 13 Abb. N. Cases 210 (New York 1883). *Wood & Selick v. Compagnie Generale Transatlantique*, 43 Fed. 2d 941 (2d Cir. 1930) may be subject to the same criticism.

¹² Perhaps the outstanding example of the ridiculous results that can be reached is illustrated by the German case of *Reichsgericht*, Jan. 4, 1882, 7 R.G.Z. 21, cited in ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS, 253, and in LORENZEN, CASES ON CONFLICT OF LAWS 287 no. 39 (6th ed. 1951). There a suit was brought in Germany on a contract made in this country. The time limited in both the American and the German statute had expired; yet the court allowed the action on the reasoning that the American statute was procedural—thus, it had no application to a suit brought in Germany—and the German statute was substantive—thus, it did not apply to a contract made elsewhere. Since no time period limited the action, the suit was timely brought. The sin committed by the court was in binding its hands by the use of labels. Had it approached the problem by looking to uniformity of results as a goal, an entirely different decision would have been reached.

to determine whether the action was timely brought.¹³ In the typical case there is no thought given to the fact that the result of the litigation thus turns, not on the whim of the judge, but on something of even graver concern, on the *accident of forum*. This problem is confounded and accentuated in common law countries where the plaintiff may bring his suit in any forum where he happens to "catch" the defendant with personal service of process.¹⁴ Nor is it always a very practical answer to tell the parties that application of the forum's period does not affect the plaintiff's right since (1) if the plaintiff is denied recovery under a longer local statute, there is no assurance that the defendant will ever be subject to the judicial jurisdiction of the state where the cause arose, or (2) if the plaintiff is allowed a recovery under a longer local statute, then he has a judgment on a cause which, by hypothesis, would have been barred by

¹³ That this is the prevailing view in common law jurisdictions is no longer open to serious question. DICEY, *CONFLICT OF LAWS* 859 (6th ed. 1949); 3 BEALE, *CONFLICT OF LAWS* §603.1 (1935). The rule is usually attributed to Huber, *De conflictu legum diversarum in diversis imperiis* (1686), which is part of title 3, part 2, book 1 of HUBER, *PRACELECTIONUM JURIS CUNEIS, TOMI TRES*, and discussed by Lorenzen in 13 *ILL. L. REV.* 199 (1918). The earliest English case which the author has discovered applying the rule stated in the text is *Dupliex v. De Roven*, 2 Vern 540, 23 Eng. Rep. 950 (1705). The same result was reached at an early time in this country. *Nash v. Tupper*, 1 Caines (N.Y.) 402 (1803); *McElmoyle v. Cohen*, 13 Pet. (38 U.S.) 312 (1839). One of the earliest Ohio cases holding that the statute of limitations of the state where the cause of action arose could not be pleaded in a suit brought thereon in Ohio is *Worth v. Wilson*, Wright 162 (1832). See also *Pinney v. Cummings*, 26 Ohio St. 46 (1875).

¹⁴ "... Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). *Pennoyer v. Neff*, 95 U.S. 714 (1878); *McDonald v. Mabee*, 244 U.S. 90 (1917); *RESTATEMENT, CONFLICT OF LAWS* §78; *RESTATEMENT, JUDGMENTS* §15.

There has been much agitation in recent years both to expand and to contract this "power" concept of judicial jurisdiction. The expansion is discussed in Chapter IV of STUMBERG, *CONFLICT OF LAWS* (2d ed. 1951); the contraction is represented by such concepts as *forum non conveniens*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Pope v. Atlantic Coast Line Co.*, 345 U.S. 379 (1953); and fraud in obtaining presence in the state for personal service, *Blandin v. Ostrander*, 239 Fed. 700 (2d Cir. 1917), 39 *YALE L. J.* (1930). These developments raise the question as to whether the United States Supreme Court is not now ready to base judicial jurisdiction on the contacts which the cause of action has with the particular state. See citations in STUMBERG, *supra*, and *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), *reversing* 155 Ohio St. 116, 98 N.E. 2d 33 (1951); *Smith v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A. 2d 664 (1951), 13 *OHIO ST. L. J.* 282 (1952).

The "power" concept of judicial jurisdiction is commented upon thus by Rheinsteinst in 41 *MICH. L. REV.* 83 at p. 91 (1942): "Of course under the irrational rules of jurisdiction which presently prevail in the United States, a defendant may be sued in a state with which he has no contact other than that of just happening to be there when a process server catches up with him. . ."

the statute of limitations in the state where the action arose.¹⁵ Therefore, upon analysis, statutes limiting the time for the commencement of an action should be characterized as substantive and not procedural—at least in those cases where their application affects the outcome of the litigation.¹⁶ In short, were we reshaping our judicial system and the principles of choice of law, it would be theoretically sounder for the forum court, in determining the substantive rights of the parties, to apply the statute of limitations of the jurisdiction to whose laws reference is being made. In this way, the forum would reach the same result regarding the time in which the action is maintainable as would the court where the operative facts have their situs, thus reducing the importance of the locus of the litigation on the outcome of the suit. Furthermore, this is not one of the areas in which the application of the foreign rule would work any undue hardship on the administration of the local court procedure.¹⁷

The courts, however, are not ready to accept this approach to the problem of the statute of limitations as it exists in the area of conflict of laws. Because of the effect given in this country to the role of precedent,¹⁸ they continue to hold these statutes procedural, that is, they apply the local

¹⁵ *Worth v. Wilson*, *supra*, note 13, and cases cited in 3 BEALE, *CONFLICT OF LAWS* §604.1 (1935).

¹⁶ This would seem to be the explanation of the more recent cases where the courts have applied the statute of limitations of the state to which they are referred by their conflict of laws rule for matters of "substance" on the basis that the statute prescribes the *right*, not merely the remedy. *Davis v. Mills*, 194 U.S. 451 (1904); *Negaubauer v. Great Northern Ry. Co.*, 92 Minn. 184, 99 N.W. 620 (1904); *Dupuis v. Woodward*, 97 N.H. 351, 88 A. 2d 177 (1952); *O'Neal v. National Cylinder Gas Co.*, 103 F. Supp. 720 (N.D. Illinois 1952); *Castrovinci v. Castrovinci*, 93 Ohio App. 133, 112 N.E. 2d 53 (1952); *Weiss v. Baviello*, 117 N.Y.S. 2d 891 (1952); *Lipton v. Lockheed Aircraft Corp.*, 125 N.Y.S. 2d 58, 204 Misc. 693 (1953); *RESTATEMENT, CONFLICT OF LAWS* §605.

¹⁷ Certainly, application of a statute of limitations from a sister state (or a foreign country) which state, by hypothesis, is so intimately connected with the cause of action that its laws will be referred to in determining the obligations of the parties, does not either (1) violate some deep-rooted public policy of the forum or (2) unduly hamper the administration of the local court system. *Morgan, Choice of Law Governing Proof*, 57 HARV. L. REV. 154, 195 (1944); *Cook, "Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L. J. 333 (1933). See also, *Ailes, Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392 (1941), in which the present distinction between substance and procedure is defended. It is admitted that rule now followed by the courts is simpler in administration and convenience; it is also admitted that were the courts to adopt the view expressed in the text, problems of interpretation of the statute of limitations of other states would be presented [these are not wholly avoided now, *Wood & Selick v. Compagnie Generale Transatlantique*, 43 Fed. 2d 941 (2d Cir. 1930)]; however, these seem slender reeds on which to let rights and obligations depend. Such arguments overlook the fundamental reasons for choice of law rules in the first place—for were they followed, each state would apply its own system of jurisprudence to the entire cause no matter where the operative facts occurred.

¹⁸ Judges have recognized that it is precedent—not logic—which keeps alive the present distinction. Mr. Justice Holmes in *Davis v. Mills*, 194 U.S. 451 (1904):

statute irrespective of the fact that they are willing to refer to the laws of some other jurisdiction to determine the "rights" of the parties, unless they can find some reasonable basis to "escape"¹⁹ from the general rule. There is not even a pious hope that this article will cause our courts to retreat from this position; it is now too far entrenched. Instead, the remaining pages will be devoted to an examination of the attempt of the Ohio legislature to change, at least in part, the proposition that the limitation of actions is a matter of procedure.²⁰

II.

As early as 1830 Ohio enacted a statute which purported to borrow the statute of limitations of another jurisdiction and apply it in actions in this state under certain defined conditions. This first enactment barred actions in Ohio if (1) the action was "founded on contract, either express or implied," (2) the parties to the contract resided outside of Ohio at the time the contract was made, and (3) the action was barred in the jurisdiction where the contract was made by the running of the statute of limitations there.²¹ All three had to exist before this act was of any aid and comfort to the defendant, but it does represent the attitude of the legislature (and undoubtedly the bar) in those cases where the plaintiff has waited for such a length of time that his action would be barred in the state where he entered into the contract being sued upon.

The reason for the passage of this statute becomes clear when we consider how the Ohio courts handled the problem without its help. This is well presented in the case of *Worth v. Wilson*²² where the 1830 borrowing statute was held inapplicable because that particular case was pending at the time of its passage. The defendant there tried unsuccessfully to plead the Virginia time period as a bar to the action. The result of such a holding was that if the plaintiff could plead and prove the facts of a good cause of action, he could recover in Ohio although the action

"It is true that this general proposition is qualified by the fact that ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori*, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued." [Emphasis added.]

¹⁹ *Davis v. Mills*, *ibid.*

²⁰ For a general discussion of such statutes, see *Legislation Governing the Applicability of Foreign Statutes of Limitation*, 35 COL. L. REV. 762 (1935).

²¹ 28 Ohio Laws 34, 3 Chase 1654, 1655 (Ch. 807) §3 (1830): "That all actions founded on contract, either express or implied, made between persons resident without this state at the time such contract was made, and which are or hereafter may be barred by the laws of the state, country or territory where such contract was made, shall be and continue barred, when brought in any court in this state."

²² *Wright*, 162 (1832). The court referred to 28 Ohio Laws 34 quoted in the prior note and then said: "This suit was brought before the passage of that act, and of course is not within its provisions." (p. 162). See also *Gordon v. Parker*, *Wright* 341 (1833).

would have been barred had the suit been brought in Virginia, the state where all of the operative facts occurred. It was this situation which the borrowing statute was enacted to prevent; it just came too late to be of any help in *Worth v. Wilson*.

A case worth examining in some detail is *Headington v. Neff*,²³ which was decided under the language of the 1830 statute. Suit was brought on a promissory note under seal. One of the defenses filed by the defendant consisted of a Maryland statute limiting the time to bring suit on a sealed instrument to twelve years, together with the allegation that this suit was not commenced within the twelve years. One of the difficulties with the case is that it does not appear that the note was "made" in Maryland and that the borrowing statute had any application to the facts.²⁴ All that does appear is that the parties resided in Maryland at the time of the execution of the contract. The plaintiff's demurrer to this defense was upheld by the Supreme Court of Ohio, but no mention was made of the fact that the statute required the contract to be *made* in another state before its limitation period was applicable. The court rested its decision on this reasoning:

. . . This plea of the statute of Maryland, in bar of the action, avers that the parties resided in Maryland, *at the time of the execution of the contract*; but does not aver that they resided there when the cause of action accrued. If, then, the defendant had left that state before the note became due, and this the plea does not negative, the statute of Maryland would be no bar to the action²⁵

Such an opinion is not surprising in the light of the language used by the legislature. It merely emphasizes that before the time period of the state where the contract was executed could be pleaded as a defense to an action brought in Ohio for a breach of that contract, it had to be shown that the suit would have been barred in the execution state had the

²³ 7 Ohio 229 (1835).

²⁴ That this is the only basis on which the defendant could rely on the Maryland statute is made clear by a very similar case decided by the same judge (Judge Wood) during the same term: "Without the aid of the statute of Ohio, the plea of the statute of Maryland would not be sustained." *State of Maryland for the Use of Shipley v. Shipley*, 7 Ohio 246 (1835).

²⁵ 7 Ohio 229, 232.

Strengthening this approach that the action must be *barred* in the state referred to by the borrowing statute is *State of Maryland for the Use of Shipley v. Shipley*, 7 Ohio 246 (1835) where on facts similar to those in the *Headington* case the court found that the action was barred in Maryland and, because of the Ohio borrowing statute, was barred in Ohio. The *Shipley* case pointed out: "Nothing is shown to except this case from the operation of the general rule, that when a statute of limitations once commences, it continues to run; and as it (the Maryland statute) commenced on December 6, 1817, and no action was commenced *for more than twelve years next thereafter*, we are of the opinion the right to sue in the State of Maryland is barred. . . ." (p. 247).

plaintiff commenced his suit there rather than in Ohio.²⁶ To this extent the statute of limitations was made a matter of substance.

An even more pointed case is *Smith v. Bartram*²⁷ in which the plaintiff sued in Ohio upon certain notes which had been executed and delivered in the state of Pennsylvania more than six years prior to the time the action was brought. In his answer the defendant set up the statute of limitations of Pennsylvania which limited the time for the commencement of such actions in that state to six years. However, this statute contained a further provision tolling its operation when the defendant has been, during the six year period, "beyond sea." The problem was whether the plaintiff could take advantage of this portion of the act and thus escape the bar of the statute. The answer of the court was clear:

Such a reply to *such* a plea of the statute of limitations, is sufficient, and will authorize the plaintiff to prove himself within the savings of the statute, when it is offered in evidence.²⁸

Furthermore, it was permissible to show how the words "beyond sea"²⁹ had been interpreted by the courts of Pennsylvania, but since no evidence to this effect had been offered, the Ohio court had to rely upon their meaning under Ohio law. Important to notice, is the fact that the court looks each time to see how the state referred to would have handled the limitations defense if the suit had been brought there.³⁰ In other words, the court, through the borrowing statute, is trying to reach the result that would have been reached in regard to the problem of the time when the

²⁶ That the court was concerned with the requirement of residence as spelled out by the statute of Maryland, see 2 S. & C. Revised Statutes (1860) p. 950, n. 2.

²⁷ 11 Ohio St. 690 (1860).

²⁸ 11 Ohio St. at 690.

See a similar approach in *Ingraham v. Hart*, 11 Ohio 255 (1842). At 256 the court emphasized the need for the same approach to the statute of limitations as is given by the state referred to: "But the question is not what is the *just and true* interpretation, but what is the *actual construction* of the document by the Pennsylvania tribunals?"

²⁹ For a discussion of these words, see *Alaska Credit Bureau of Juneau v. Fenner*, 80 F. Supp. 7 (1948).

³⁰ The case of *Horton v. Horner*, 14 Ohio 437 (1846), strengthens this position of the Ohio court. There it was held that the Act of 1830 set out above (as amended in 1831—see note 32 *infra*) barred a suit brought in Ohio if it was barred in New York. ". . . It is said that the defendant is a resident of the State of New York, and not within the State of Ohio, so that our statute could not begin to run. This debt was contracted in the State of New York; it was to be paid there; the debtor has always resided there. By the statute of that state, which is set up in the answer, the claim is barred. And our statute of limitations provides that where a contract is barred by the law of the state where it was made, the statute of such sister state may be set up as a bar here." The plaintiff's bill was dismissed.

A year later the case came again to the Ohio Supreme Court, this time the complainant claimed his assignor was not a resident of New York when the contract was made but that at all times domiciled in the State of Ohio. From this it

suit must be commenced had this action never been made transitory and thus had been sued upon as a non-conflict of laws case.³¹

Prior to 1910 this statute was twice amended. In 1853 it was extended to all causes of action, not merely to those founded upon contract "express or implied,"³² and in 1878 the requirement of non-residency was dropped. The language of the later amendment was terse and to the point: "If, by the law of the state or country where the cause of action arose, the action was barred, it is also barred in this state."³³ This, of course, expanded greatly the scope of the 1830 statute. No longer did the cause have to be one sounding in contract, and no longer did the parties have to be non-residents of Ohio.³⁴ It did not, however, call for a change in the interpretation given its predecessor.

III.

For the next thirty-two years there appears no case in the Supreme Court of Ohio that had occasion to apply the 1878 revision.³⁵ Then, for no apparent reason, the legislature once more amended the Ohio borrowing

was urged that the borrowing statute had no applicaion since the parties were not *residents* of the state where the contract was made (admittedly this contract was made in New York). The court interpreted the word "resident" (as it related to the complainant's assignor) to mean something closely akin to presence, at least when the defendant was domiciled in the state where the contract was made. "Under this provision (the borrowing statute of 1830) the action against respondent is barred, or there is no law that could ever reach the case and prevent an action from being maintained at any time within fifty years. . . ." 16 Ohio 145, 147 (1847).

³¹ Compare Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938). In this article, Dean Griswold concluded in connection with the problem of *renvoi* with this sentence: "Reconsideration seems to show, as English and American courts have found, that there are many situations where satisfactory solutions to puzzling problems can be worked out by looking to the 'whole law' of a country designated by a local choice of law rule, and then reaching the same result which would be reached by the courts of that country." (p. 1208). One of the illustrations cited is that of statutes which purport to borrow time periods from other jurisdictions. See page 1201 n. 129. Thus the problem under discussion is only part of the broader area of choice of law rules and the extent to which foreign law will be referred to in solving conflict of laws problems presented to the forum court.

³² 51 Ohio Laws 58, 60, 3 CURWEN'S REVISED STATUTES Ch. 1202 §22 (1853): "Where the cause of action has arisen in another state or country between non-residents of this state, and by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action can be maintained in this state."

There was also a minor amendment in 1831. The word "in" was inserted after the first word in the statute. 3 Chase 1768, 1769 (Ch. 839).

³³ 78 Ohio Laws 597, 604 §17 (1878); REVISED STATUTES, 1880, §4990; Clark v. Eddy, 10 Ohio Dec. Repr. 539, 22 Wkly Law Bull. 63 (1889).

For a history of the borrowing statute, see Hilliard v. Pennsylvania, 73 Fed. 2d 473 (6th Cir. 1934).

³⁴ That it is not unconstitutional to distinguish between residents and non-residents under a borrowing statute, see Canadian Northern Railway Company v. Eggen, 252 U.S. 553, (1920). Cf. Chemung Canal Bank v. Lowery, 93 U.S. 72, (1876).

³⁵ The revision was considered in Clark v. Eddy, *supra* note 33, and the

statute.³⁶ With minor changes the 1910 version is the one which is in effect today:

If the laws of any state or country where a cause of action arose limit the time for the commencement of the action to a lesser number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years.³⁷

Since there was no definitive litigation under the 1878 statute, there is no reason to believe that the legislature was dissatisfied with the court's application of the wording of that act. Indeed, all that can be surmised is that this was an attempt to revise the older language. Nor does this revision indicate that any change in meaning was intended. Instead, it appears to be an attempt to make express that which may have only been implied before. Notice that the 1878 act does not expressly limit itself to situations where the foreign cause was barred by the foreign statute of limitations. Reading only the language, one might argue that any bar to the cause was a bar in Ohio, and that it thus adopted more than the foreign time period. Perhaps this is what the legislature was trying to correct. If so, then the choice of words was unfortunate, for the cases which followed changed completely the *Headington-Smith*³⁸ interpretation which read the statute to insure similarity of result, so far as concerns the time in which the plaintiff may commence his suit, with the state where the cause arose.

Whose Cause of Action Must be Like Whose?

The present interpretation of the Ohio statute is perhaps most graphically illustrated in the case of *Alropa Corp. v. Kirchwehm*.³⁹ There the defendant executed in Florida an *agreement under seal* in which he promised to pay to the plaintiff a sum of money. Seven years after the cause accrued, suit was brought in Ohio for the unpaid balance due under the agreement. The defense interposed was the Florida statute of limitations which the plaintiff claimed was applicable because of the borrowing statute (Ohio Revised Code §2305.20) under consideration here. A look at the statutes of the two states involved is interesting. Florida's

discussion there is of benefit in considering the history of the section. One sentence of the opinion is worth contrasting with later Ohio cases, cited *infra*: "As the law now stands, in other words, the bar of a foreign limitation is not, as heretofore, by our statute made to depend on any express provision respecting the residence of the parties to a suit, but wholly upon the law governing the locus of the cause of action."

³⁶ 101 Ohio Laws 226, §11234 (1910): "If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state."

³⁷ OHIO REV. CODE §2305.20 (11234).

³⁸ Text for notes 23-31, *supra*.

³⁹ 138 Ohio St. 30, 33 N.E. 2d 665, (1941) *appeal dismissed*, 313, U.S. 549, (1941).

act allowed twenty years for actions to be commenced on contracts under seal but only five years for suits on simple contracts⁴⁰—that is, unsealed agreements. In Ohio private seals had been abolished⁴¹ but the plaintiff would have had fifteen years in which to bring his suit had all the facts occurred in Ohio.⁴² Here, then, is a case in which, if the conflict of laws aspect were removed, there is no doubt but that the statute of limitations would have been of no aid to the defendant. If the plaintiff had been able to secure judicial jurisdiction over the defendant in Florida where the cause arose,⁴³ there would have been no problem in conflict of laws since the operative facts took place in that forum; or on the contrary, had the facts occurred in Ohio, again there would have been no conflicts question since once more the situs of the facts and the forum of the suit would have been identical. And in both cases the defense of the statute of limitations would have failed. Therefore, the only basis on which the *Alropa* opinion can be placed is the Ohio borrowing statute. Relying on this act, the court with a bit of remarkable reasoning borrowed the Florida five year period and barred the action in Ohio.⁴⁴ Yes, there are quaking quagmires in the dismal swamp called conflict of laws.

Its reasoning was this: whether this agreement for the purpose of the problem of the statute of limitations is to be characterized as one under seal is a matter to be determined by Ohio law; in Ohio seals are abolished; therefore, this becomes a simple contract in writing; the Florida limitations period for simple contracts is less than that in Ohio (five as opposed to fifteen years); thus the action is barred by virtue of the borrowing statute. The *Alropa* court thus reads our borrowing statute to require, first and foremost, an Ohio characterization of the fact situation presented. This will determine just what *the* cause of action is. Then having named it, the decision transports that legal name to the state where the operative facts occurred and checks to see what statutory period applies to a *like* cause of action (still clinging jealously to the name) in that state. If the

⁴⁰ FLA. STAT. §95.11, as amended, Laws 1943, c. 21892 §1; Laws 1947, c. 24337 §7B.

⁴¹ OHIO REV. CODE §5.11 (32). “. . . Private seals are abolished, and the affixing of what has been known as a private seal to an instrument shall not give such instrument additional force or effect, or change the construction thereof.”

⁴² OHIO REV. CODE §2305.06 (11221). “An action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.”

⁴³ It is not always so easy to ascertain where a cause of action “arose.” See *Pattridge v. Palmer*, 201 Minn. 387, 277 N.W. 18 (1937), note, 51 HARV. L. REV. 1290 (1938); *Cope v. Anderson*, 331 U.S. 461, (1947); 35 COL. L. REV. 762 (1935). In Ohio a cause of action “arises” where a contract is to be performed. *Meekison v. Groschner*, 153 Ohio St. 301, 91 N.E. 2d 680 (1950). For a holding on place where a cause of action arises when judicial jurisdiction is based on attachment of the defendant’s property, see *Panhandle Eastern Pipe Line Co. v. Parish*, 168 Fed. 2d 238 (10th Cir. 1948).

⁴⁴ *Accord*: *National Bondholders Corporation v. Edward J. Stoddard*, 22 Ohio Op. 145, 8 Ohio Supp. 19 (1941).

time is less than Ohio's period, the borrowing statute goes into full operation to bar suit in Ohio. Several comments to such an approach become apparent.

That the legislature intended the rights of the parties to depend upon the legal name which Ohio happens to give an action seems questionable.⁴⁵ Such names are employed merely for identification so that similar fact situations can be grouped together for the application of general ideas of jurisprudence. But the day is fast going, or rather it was thought to be fast going, when it is of vital importance to have a specific legal compartment into which fact patterns must be forced to determine rights and obligations. Attention should, instead, be focused on the *facts* which are before the court and not upon a *category* which history has attached to them. Thus, it is the fact pattern, itself, and not what it is called which should be compared in the two states involved. For example, in *Drinan v. Lindemann & Haverson Co.*⁴⁶ an action was brought in a federal district court in Wisconsin by the administrator of the decedent against the defendant, a manufacturer of oil stoves. The complaint alleged that the stove was negligently manufactured so that when the decedent (then in the state of Michigan) ignited it, it exploded burning the decedent so badly that she died within a few hours. To allegations which were admittedly in the nature of a suit under the Michigan Wrongful Death Act, the complainant-administrator added that "plaintiff's decedent was severely burned causing her to suffer great and excruciating pain and agony for a period of some hours before her death." This, the defendant claimed, turned the action into one for survival damages and that such a suit was barred by the Wisconsin statutory notice period of two years.⁴⁷ In rejecting this defense the court, without the aid of a borrowing statute, characterized the facts according to Michigan law, and found that under the decisions of the courts of that state this was a suit for wrongful death;⁴⁸ and then held that the Wisconsin (forum state) two year notice statute did not apply to foreign *wrongful death actions*. The court emphasized throughout its opinion the manner in which a Michigan court would classify the fact pattern which was then presented. Nowhere is the court concerned as to how Wisconsin would have treated it had the facts occurred there.

Unless the borrowing statute of Ohio requires the words "cause of

⁴⁵ Morse, *Characterization: Shadow or Substance*, 49 COL. L. REV. 1027 (1949). Cf. *Alropa Corporation v. Smith*, 199 S.W. 2d 866 (Mo. Appeals 1947).

⁴⁶ 202 F. 2d 271 (7th Cir. 1953).

⁴⁷ WISC. STAT. §330.19(5). "No action to recover damages for injury to the person shall be maintained unless, within two years of the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused." No notice was given in this case.

⁴⁸ ". . . In these cited cases (all from Michigan), as well as in others we have read, we find no holding or nothing to indicate other than that an action under the 1939 (Michigan) Act is one for wrongful death. . . ." 202 F. 2d at 274.

action" to be read to mean a legal conclusion rather than the fact pattern on which that conclusion was based, the approach of the *Drinan* court appears much sounder. Certainly the legislation evidences no intent that such an interpretation be given the statute, especially when its history and emphasis on similarity of results⁴⁹ is considered. Indeed, the Supreme Court of Ohio has recognized that a "cause of action is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf."⁵⁰ There is no reason to believe that a different approach was called for by the use of the same words in the borrowing statute. As long as Ohio continues to emphasize the particular name which is given locally to a series of facts giving rise to a suit, the application of Ohio Revised Code §2305.20 and, indeed, the outcome of the litigation will depend upon the happenstance of the foreign jurisdiction employing the same legal name for those facts.

There is, however, an even greater objection to the *Alropa* case. Assuming that the court is correct in its interpretation of the words "cause of action" in this statute as requiring a characterization of legal conclusions, it has nevertheless placed the judicial cart before the legislative horse. The borrowing statute presented this question to the court: do the laws of Florida limit the time for the commencement of *the* action to a lesser number of years than do the statutes of Ohio in *like* causes of action?⁵¹ If so, but only if so, the suit is barred in Ohio. Thus, the statute says that the first job of the court is to determine what *the* action would have been in Florida. Only after this is done can it be decided what a *like* cause would be in Ohio. The *Alropa* decision turned this process around, for it was concerned with what the action would be in Ohio and then searched for a like cause in Florida. Authority for such a change in the language of the legislature was not cited, nor could any be found. Nowhere does the court face up to this problem in interpreting the statute. If it had, then there appear two approaches which could then have been followed, both of which reach the same conclusion: the Ohio borrowing statute has no application to the case.

(1) It could have looked to see what the time period would have been had suit been brought on the *fact pattern* in Florida. Since the fact pattern involved an agreement under seal, the twenty year period would have been the statutory bar. A like fact pattern in Ohio would meet the

⁴⁹ See discussion under II, *supra*. The *Alropa* court does not cite the earlier cases nor attempt to justify its result in light of the history of Ohio Revised Code §2305.20.

⁵⁰ The Baltimore & Ohio Railroad Company v. Larwil, 83 Ohio St. 108, 93 N.E. 619 (1910). See also Cope v. Anderson, 331 U.S. 461, (1947) dealing with Ohio's borrowing statute.

⁵¹ The language of the statute quoted by *Alropa* was this: "If the laws of any state or country where *the* cause of action arose limits the time for the commencement of *the* action to a less number of years than do the statutes of this state in *like* causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years." (Emphasis added).

fifteen year period of limitations since it is a contract in writing. Therefore the Florida period is not less than that of Ohio and Ohio Revised Code §2305.20 is of no relevancy.⁵²

(2) It could have looked to see what the time period would have been on the *legal name* given to a suit in Florida on the fact pattern. There it would have been an action of specialty which called for the same twenty year period. The Florida legal name, specialty, would then be brought to Ohio to determine what a like suit would have been here. The answer could have been (a) that it would be called a specialty here,⁵³ (b) that it would be a suit on a contract in writing, or (c) an admission that there is no like suit which could be maintained in Ohio.⁵⁴ In any of these events the borrowing statute would have no application either because the Florida period was not less than Ohio's or because we have no like cause in this state.

It is submitted that approach (1) is the sounder, but the decision at no place attempts to answer the problem. To reach its remarkable conclusion—the barring of an action which would not have been barred in either state absent the conflicts problem—the court cited several cases which hold that for the purpose of applying local general statutes of limitations the question of whether the instrument sued upon is or is not under seal is to be decided by reference to forum law.⁵⁵ The basis for these holdings is the general proposition that the form in which an action is brought is a matter of remedy. While this result may or may not be sound,⁵⁶ it has nothing to do with the *Alropa* problem, since the cited cases do not deal with a borrowing statute. They deal with which of two

⁵² This was the approach of *Alropa Corporation v. Smith* 199 S.W. 2d 866 (Mo. App., 1947) although in that case the forum, too, had abolished seals. The Missouri court distinguished the Ohio case on the language of the statute (sed query) but at p. 370 added: "So we will leave it to the courts of Ohio to construe its own statute, with the observation that we are gratified that no such incongruity can result from a construction of our statute such as appears by the decision in the *Kirchwehm* case."

⁵³ Judge Bell, in his dissenting opinion in *Payne v. Kirchwehm*, 141 Ohio St. 384, 48 N.E. 2d 224, 149 A.L.R. 1217 (1943), *appeal dismissed*, 320 U.S. 706, (1943), *rehearing denied* 320 U.S. 813, (1943), argued forcefully that even though seals had been abolished in Ohio still these instruments could be classified as *specialties*. Notice that the word "specialties" is retained in Ohio's general statute of limitations. Note 42 *supra*.

⁵⁴ This suggestion was made in a note in 22 Ohio Op. 107.

⁵⁵ All of the cases cited by the court, with the exception of two, are discussed in 109 A.L.R. 479. The two cases were decided after the annotation.

⁵⁶ This is, again, an example of courts allowing the result of the suit to depend upon the accident of forum. While as a general proposition no harm is done in following the form of remedy allowed by the forum, *RESTATEMENT, CONFLICT OF LAWS* §586, when the remedy selected affects the substantive rights of the parties, there appears good reason for characterizing by the state whose laws are being referred to, to decide those substantive rights. *ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940) Ch. IX. This is in accordance with the test suggested by the authors cited in note 17 *supra*.

general time periods of the forum is to be applied. Granting that the general rule may be that the form of action is remedial, still the Ohio court was faced with a statute which required it to look first to the remedy (or fact pattern) in the foreign state and then compare the remedy (or fact pattern) in Ohio.

The case relied upon most strongly by *Alropa* was *Bank of United States v. Donnelly*⁵⁷ where the problem was whether Virginia's (the forum of the suit) limitation period for sealed or for unsealed instruments would be applied to a note executed and payable in Kentucky. The court assumed that under the law of Kentucky the note would have been considered a specialty⁵⁸ but held that since the remedy was sought in Virginia, its laws would determine the form of action which should be brought. Since under Virginia law this was not considered a sealed instrument, the shorter period of time was applicable. Such a case has relevance only where the forum has two statutory periods which might be applicable depending on how the action is characterized. This is not the situation in *Alropa*. No matter how Ohio characterized that agreement, still its fifteen-year period was to be applied since no time distinction is drawn between specialties and contracts in writing. The problem in *Alropa* was a step beyond any of the cases which the court cited, for it involved an interpretation of a borrowing statute. The *Donnelly* case and its progeny can be granted, still the language of the statute must be reckoned with. Under its terms, characterization must first take place as though the suit were being brought in the state where the cause arose. Once this determination has been made, then—but not until then—can the court determine whether the laws of Florida limit "the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action." Thus approached, the borrowing statute is inapplicable in *Alropa* and the only bar became the remedial (or procedural) fifteen year general Ohio time limit. The fact that in a different situation involving statutes of limitations the court treats the form of action as remedial should not be conclusive on the interpretation of a statute like Ohio's.

A Method of Application

Nor does the confusion end here. Two years later the Ohio court decided *Payne v. Kirchwehm*.⁵⁹ Here the defendant's assignor executed two promissory notes to the plaintiff's assignor, one being payable in December of 1926 and the other in December of 1927. Both were under seal. At the time the action accrued against the defendant he was out of the state of Florida and was absent therefrom until the suit was brought in

⁵⁷ 8 Pet. (33 U.S.) 361, (1834).

⁵⁸ This assumption was questioned in the opinion when the court pointed out that even in Kentucky the statute did not make the note a specialty; it merely placed the instrument "on the same footing as sealed writings."

⁵⁹ See note 53 *supra*.

Ohio in October of 1941. Again the defense was the Florida five-year statute as applied by the *Alropa* case. However, Florida also had a tolling statute which provided that if "when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state."⁶⁰ The similarity of the facts with those of the *Alropa* case is striking. Had the suit arisen in Florida, the local limitations statute would have been no defense for two reasons: (1) the notes were under seal and the plaintiff had twenty years to commence an action thereon; and (2) the defendant was outside of Florida when the cause arose and so that not even the five-year period had yet begun to run. Had the facts occurred in Ohio, the suit was commenced within the fifteen year "contract in writing" limit. After *Alropa*, the first approach under the Florida statute was no longer open to the plaintiff. Thus, he relied upon the fact that no matter how the action was characterized—sealed or unsealed—the limitations period where the cause arose had not as yet barred the action. Undaunted, the Ohio Supreme Court continued on the path which it had begun to blaze in *Alropa* and sustained the defendant's demurrer. The suit had not been timely brought.

Here is a very interesting addition to the case law of Ohio, for the court "borrowed" only a part of the Florida statute. It looked only to the number of years in which the action could have been brought in that state and refused to "borrow" the companion act which indicated that the number of years had not as yet started to run. Stated differently, the Ohio court when it looked to the "laws" of Florida, as it must under the borrowing statute, was not interested in how those laws as a whole apply to the case at bar, but only as those laws would apply to a hypothetical case which was not (and under the facts, could not have been) before the courts of either state.⁶¹ It was looking to how the laws of Florida limiting the time for the commencement of actions would govern a case where the defendant executed a note not under seal and had remained for more than five years within the judicial jurisdiction of the Florida court. It is submitted that this is a novel way of disposing of an actual case in which both of the assumed hypothetical facts do not exist.

The opinion was justified on this ground:

... It would indeed be an anomalous bit of logic to hold that although the defendant has been in Ohio and therefore subject

⁶⁰ FLA. STAT. §95.07 (1941).

⁶¹ This is not a unique situation in conflict of laws. See *Milliken v. Pratt*, 125 Mass. 374, (1878) and Cook's analysis of the case in 31 ILL. L. REV. 143 (1936). Countless additional cases could be cited when the forum court refuses to consider how the foreign court would decide the case which is before it. Justice Holmes recognizes this in *Union Trust Co. v. Grosman*, 245 U.S. 412, (1918). However, this seems no defense for perpetuating this error, assuming, of course, that there is validity in the proposition that the main purpose of choice of law rules is to prevent, whenever possible, the happenstance of forum from determining the outcome of the litigation.

to an action by the plaintiff in this forum, nevertheless the statute of limitation has been prevented from running against the plaintiff in Ohio for no other reason than that the defendant has been absent from Florida.⁶²

The court was impressed by the fact that during the statutory period the defendant had been making his home in the state of Ohio.⁶³ Had he been living in Indiana perhaps a different result would follow.⁶⁴ Where the defendant resides had been thought, since 1878, to be irrelevant for the purpose of the application of the borrowing statute. At least the legislature dropped the requirement at that time. The court seemingly overlooked the fact that the only place this suit could be brought was in Ohio and that under the facts no judicial jurisdiction existed in the Florida courts as against this defendant on these notes. If a plaintiff delayed in bringing suit in his home state when there is jurisdiction to maintain an action, then there is good reason for holding the tolling statute inapplicable. But when his only suit lay in Ohio, it is incongruous to borrow only the time period from a state in which no action could possibly be brought without considering that fact as reflected through its tolling provisions.⁶⁵

Perhaps the court was troubled by the fact that a contrary decision

⁶² *Payne v. Kirchweh*, 141 Ohio St. 384, 387 and 388.

⁶³ While he was in Ohio it is assumed that the defendant was not subject to the judicial jurisdiction of the Florida courts. If the plaintiff had sought to bring his action against the defendant in Florida, there would have been no jurisdictional basis (at least none is given in the case) for that court to render a binding judgment against him. *Pennoyer v. Neff*, 95 U.S. 714, (1878). Had there been a basis of judicial jurisdiction in Florida during the absence of the defendant from that state, a different conclusion should follow. *Karagiannis v. Shaffer*, 96 F. Supp. 211 (W.D. Pa. 1951); *Crowder v. Morphy*, 61 Wash. 626, 112 P. 742 (1911). In such a case, the non-residence tolling statute is inapplicable.

⁶⁴ The place of residence should not make a difference (as long as it was outside of Florida) if the distinction drawn in the preceding note is accepted. Had he resided (hypothetically) in Indiana for its statutory period and then moved to Ohio, a problem of which period is to be borrowed would be presented. *West v. Theis*, 15 Idaho 167, 96 Pac. 932 (1908) gives one answer. Cf note 30 *supra*.

⁶⁵ See note 63 *supra*.

A case which should be compared with *Payne* is *Stevens v. Walker* 61 F. Supp. 441 (W.D. Wash. 1945). Suit brought in federal district court in Washington on tort action arising in Oregon. The court applied the Oregon time provision but refused to consider the tolling statute since "the court's process at all times since the date of the origin of the cause of action could have been invoked as against the defendant herein, irrespective of whether he was within or without the State of Oregon." Such a decision is questionable. It appears to overlook many other problems involved in bringing suit in a federal court, such as, jurisdiction, service and venue. Then, too, it raises a situation where the suit could be maintained in an Oregon state court but upon removal to the federal court in Oregon (if removable) it would have been barred. This does not accord with the present method by which the federal courts handle the state statute of limitations. *Guaranty Trust Co. v. York* 326 U.S. 99 (1945), *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

would discriminate against residents of Ohio. Discrimination comes about in this way: if the defendant had resided continuously in the state where the cause arose, there would have been nothing to toll the limitations period of that state and the non-resident (of Ohio) could then take advantage of Ohio's borrowing statute in an Ohio suit; however, if the defendant moved to Ohio and became a resident here, then the tolling statute operates in the state where the cause arose and the resident (of Ohio) cannot take advantage of Ohio's borrowing statute. This was the basis of the opinion in *Irving Nat. Bank v. Law*⁶⁶ where the federal court was called upon to interpret section 13 of the Civil Practice Act of New York, which, so far as is relevant here, provides that when a cause of action arises outside of New York, "an action cannot be brought . . . after the expiration of the time limited by the laws of a state or country where the cause of action arose." Judge Learned Hand wrote the opinion in which he recognized that two views were possible as to section 13; one, that the law "exposed persons sued in New York to no longer a period of limitation than did the law of the place where the cause of action arose; the other, that no one should be sued in New York if at the time he could not be sued in the state where the cause of action arose." Finding no New York cases⁶⁷ controlling, the court accepted the first view, saying:

It appears to us, with the greatest deference, that the view adopted in *Isenberg v. Ranier*,⁶⁸ would in its consequence substantially defeat what was the purpose of the provision. We must remember that in any case the limitations of the New York statute apply, and that therefore section 13 has no purpose at all, except in as far as it shortens those periods. To hold that it shortens the period only for those who are already protected from suit in the foreign state involves the result, broadly, that, while residents of the foreign state may invoke it, residents of New York or elsewhere may not, because it is generally only during residence within a state that limitations run. That is indeed a conceivable view to take, but it seems highly improbable. We should suppose than an important part, at any rate, of the purpose of the section was to put residents of New York, who had incurred a liability in another state, on a parity with residents of that state who remain there. This in practice is impossible, unless the foreign period of limitation is taken as prescribed for such cases. . . .⁶⁹

If this is the view which the Ohio court was taking, it is to be regretted that it did not indicate as much in its opinion rather than to seek to justify its position by labelling any other possibility as an "anomalous bit of logic." However, the history of the Ohio statute makes the ap-

⁶⁶ 9 F. 2d 536 (2d Cir. 1925).

⁶⁷ It did cite *Isenberg v. Ranier*, 130 N.Y.S. 27, 145 App. Div. 256 (1911) but held that decisions of intermediate courts were not binding on the federal court.

⁶⁸ See note 67 *supra*.

⁶⁹ *Irving Nat. Bank v. Law* 9 F. 2d 536, 538 (2d Cir. 1925).

proach of the *Law* case of dubious value here. Prior to 1878 non-residency was a pre-requisite for the operation of our borrowing statute; in that year the requirement was dropped. True, this was non-residency at the time the action had arisen and thus could be distinguished from a case where the defendant becomes a non-resident at a later time, but the *Payne* court nowhere deals directly with the problem thus posed.⁷⁰ It does not refer to the history of the statute as the legislature dealt with the question in the case nor does it cite any of the pre-1910 decisions.⁷¹

That this may have been what was actually troubling the Ohio court is strengthened by the earlier Court of Appeals case of *Bowers v. Holabird*.⁷² There Bowers executed and delivered to Holabird in Illinois a promissory note in the amount of \$300.00. Holabird claimed that the last payment was made in November of 1919. In 1920 Holabird took up residence in Ohio and continued to live there until his death in 1932. Suit was brought against Holabird's executor for the unpaid balance and interest in 1933. The defense was "that said note is barred by the statute of limitations of the state of Illinois, being the State in which said note was alleged to have been made and the State in which said note is payable and being barred in the State of Illinois is barred by the statute of limitations in the State of Ohio." Illinois had a ten-year statute for suits on a note but also had enacted the usual tolling provisions for defendants who were absent from the state. Thus, had the plaintiff been able to secure judicial jurisdiction over the defendant in the state of Illinois in 1933, the statute of limitations would have been no defense to this suit on the note. Also, had this note been executed and payable in Ohio and had the suit been brought there, the fifteen year provision (applicable to agreements in writing) would have been no defense until the following year. Foreshadowing the *Payne* case, the Court of Appeals of the Sixth District borrowed only that part of the Illinois statute which spells out the time, the number of years, in which the action could have been commenced in Illinois and refused to borrow the companion act which extended this

⁷⁰ On rehearing, the decision in the *Law* case, note 66 *supra*, was reversed on the basis of two New York Court of Appeals cases which were not cited at the first hearing. 10 F. 2d 721 (2d Cir. 1926). The ultimate result of the case was, therefore, to allow the plaintiff to plead the defendant's absence from California (state where cause arose) to prevent New York's (the forum) borrowing statute from barring the suit. Thus, the court recognizes that the California tolling statute was to be borrowed along with the time period prescribed in the general limitations section.

⁷¹ The statute of New York is similar to Ohio's in that it refers to the *time* limited by the laws of the state where the cause arose rather than whether the action there would be *barred*. Under this statute, the New York courts have held that the sister state's statute is to be applied in the same manner as that state would have applied it. *Klotz v. Klotz*, 220 N.Y. 347, 116 N.E. 24 (1917). If it has been tolled by the defendant's non-residence in the foreign state, then it is no bar in New York. *Hanna v. Steadman*, 230 N.Y. 326, 130 N.E. 566 (1921).

⁷² 51 Ohio App. 413, 1 N.E. 2d 326 (1925).

time as against non-residents. That only one statute represents the "laws" of Illinois is open to serious theoretical objections. However, this was no problem for the court as it remarked:

The statute of limitations is not a will-of-the-wisp that can fly from one state to another as fancy dictates. To hold that the Illinois limitation of ten years is superseded by the Ohio limitation of fifteen years, because the operation of the Illinois statute is suspended by Section 19 (tolling provision), which requires subtraction from the limitation period within which an action may be brought in that state of the time of absence therefrom prior to the expiration of the limitation, would create a strange paradox. If this construction were to be adopted, then, since the Illinois and not the Ohio statute of limitations must be held to apply to the alleged cause of action of Bowers, Holabird, while continuing to reside in Ohio, and regardless of how many years beyond ten years he had resided therein, could not claim the benefit of either the Illinois or Ohio statute of limitations in an action brought against him on the note in Ohio. Bowers had ten years in which to prosecute his cause of action in the state of Ohio. For some reason he chose not to do so but to await the possible return of Holabird to Illinois. Now he is too late.

Of course, the statute of limitations does not fly back and forth between states like a will-of-the-wisp, nor, for that matter, does it fly back and forth like anything else. Under the general rule which the courts have labored and worked upon for many years, only the Ohio statute could be applied to the case. One of these Ohio statutes was the borrowing provision and if it did not apply, then the general sections limiting the time for the commencement of suits was available to the defendant. The "strange paradox" in the case is the statement that Bowers had forever to proceed against Holabird in the Ohio courts and not the fact that the Illinois tolling section might be looked to.⁷³

It can be surmised that the *Payne* court was troubled by the fact that an application of the limitation period of the state where the cause arose in the same manner that it would have been applied had the suit been brought there would discriminate against residents of Ohio. If this is the difficulty, the court should have faced up to the problem and attempted to answer it in light of the history and language of the statute. It should also have kept in mind that the overwhelming weight of authority in those states which have thus approached the problem accords with the thesis of this article: that the forum should apply the statutory period of the state referred to in the same manner in which that state would have applied it had the suit been commenced there.⁷⁴ Such an interpretation is

⁷³ See note 64 *supra*.

⁷⁴ See cases cited in 149 A.L.R. 1224 and *Anderson v. Andrews*, 62 F. Supp. 705 (E.D. Pa. 1945); *Renault v. L. N. Renault & Sons*, 90 F. Supp. 630 (E.D. Pa. 1950); *Karagiannis v. Shaffer*, 96 F. Supp. 211 (W.D. Pa. 1951); *State Comp.*

one more step toward the goal which will prevent the accident of forum from determining the outcome of the litigation.⁷⁵

IV.

This year marks the 125th anniversary of Ohio's first borrowing statute. Whether those 125 years have witnessed an advance in the solution of the problem of the statute of limitations in conflict of laws is conjectural at best. The present answers in Ohio have not attempted to probe for or to discover the underlying purpose of the borrowing statute. Instead, the decisions (like many of the cases in this area of law) treat the problem as though it can be solved by a rule of thumb and with such phrases as "any other result 'would be an anomalous bit of logic.'" This approach results in solving actual cases by reference to hypothetical situations which are not and could not be before any court. The lawyer is left with a difficult task, indeed, when he seeks to advise a client in a situation with multi-state contacts.⁷⁶ No wonder the practitioner avoids a "conflicts" problem as he would a dread disease—even if the result is that he loses a case which otherwise could be won.

The policies could and should be determined by the courts. However, with the present interpretation of Ohio Revised Code §2305.20 having weathered the storm of two Ohio Supreme Court decisions and with the reluctance of the United States Supreme Court to review state court decisions relating to the distinction between substance and procedure,⁷⁷ the only practical solution to this problem may lie with the legislature.⁷⁸ A return to the language of the pre-1910 statute which required the action to be *barred* in the foreign state rather than the

Ins. Fund v. Proctor & Schwartz, 102 F. Supp. 451 (E.D. Pa. 1952); *Markson v. Shelton*, 124 F. Supp. 206 (D.C. Kan. 1954) (but here the Kansas statute excluded non-residents of the state from application of the borrowing statute); *Bank of Nova Scotia v. San Miguel*, 196 F. 2d 950 (1st Cir. 1952). *Jenkins v. Thompson* 251 S.W. 2d 325 (Mo. 1952); *Cogswell v. Cogswell*, 178 Ore. 343, 167 P. 2d 324 (1946); *Shannon v. Shannon*, 193 Ore. 575, 238 P. 2d 744 (1952); *Hanna v. Steadman*, 230 N.Y. 326, 130 N.E. 566 (1921); *Garford Trucking Co. v. Popp*, 118 N.Y.S. 2d 158 (1952); *American Lumbermen's Mutual Casualty Co. of Ill. v. Cochrane*, 134 N.Y.S. 2d 473 (1954).

⁷⁵ Kentucky has interpreted its statute so as to allow the foreign statute to extend the local limitations period. *Burton v. Miller*, 185 F. 2d 817 (6th Cir. 1950), and *Albanese v. Ohio River-Frankfort Cooperage Corporation*, 125 F. Supp. 333 (1954).

⁷⁶ "In developing the body of rules governing choice of law problems the ideal in view is the recognition, by common consent of the states and nations having civilized systems of law, of a proper substantive law of the transaction at hand, to be uniformly applied regardless of the forum in which litigation happens to be instituted." *Jansson v. Swedish American Line*, 185 F. 2d 212 (1st Cir. 1950).

Compare the approach discussed here with *Auten v. Auten*, 124 N.E. 2d 99 (New York, 1954).

⁷⁷ See, for example, *Wells v. Simonds Abrasive Co.* 345 U.S. 514 (1953) dealing with applications of local statutes of limitations by a federal court.

⁷⁸ See the Study in New York Law Revision Commission (1943) 139.

present wording which emphasizes the *time limit* for the commencement of the foreign action should compel the courts to apply the borrowing statute in a manner consistent with the underlying policies of conflict of laws. For the time being, though, it appears that we must agree with Mr. Prosser when he remarks that the "conflict of laws is a dismal swamp, filled with quaking quagmires. . . ." ⁷⁹

⁷⁹ No opinion is expressed as to the eccentricities of those who "inhabit" this swamp.